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No. 86-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and RAYMOND BRADLEY,
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

Whether a plaintiff in an ADEA reduction-in-force case need only demonstrate as part of his prima facie case that the employer favored younger employees, or whether the plaintiff is required to demonstrate that the favored employees were outside the protected age group.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Argument	3
Conclusion	5
Appendix A - Circuit court decisions during 1985 and 1986 concerning the issue of sufficiency of evidence to support finding of age discrimination under the ADEA.	A-1
Appendix B - Circuit court decisions from Appendix A which have reversed jury verdicts, affirmed directed verdicts for defendant, or affirmed judgments notwithstanding the verdict for defendant	A-3

TABLE OF AUTHORITIES

	Page
Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986)	1
Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir. 1983)	4
Colgrove v. Battlin, 413 U.S. 149 (1973)	5
EEOC v. Western Electric Co., 713 F.2d 1011 (4th Cir. 1983)	4
Galloway v. United States, 319 U.S. 372 (1943)	5
Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985)	4
Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979)	4
Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985)	4
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	5

Statutes:

Age Discrimination in Employment Act	2
28 U.S.C. §1254(1)	2
29 U.S.C. §621, *et. seq.*	2
29 U.S.C. §623	2
29 U.S.C. §631	2

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OPINIONS BELOW

The judgment of the district court entered on the jury verdict, dated December 31, 1984, and the Memorandum Opinion and Order of the District Court, dated March 18, 1985, are included in the Appendix to the Petition at pages A-1 and A-5. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the district court, entered May 28, 1986, and the supplemental decision denying the petitioner's petition for rehearing *en banc,* are also set out in the Appendix to the Petition at pages A-8 and A-14. The opinion of the United States Court of Appeals for the Eighth Circuit has recently been reported as *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §621, *et. seq.*, provides, in pertinent part:

> Section 4 [29 U.S.C. §623] (a) It shall be unlawful for an employer...(1) to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12, 29 U.S.C. §631 (a) provides:

> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Petitioners reaffirm their original Statement of the Case.

ARGUMENT IN REPLY

1. The respondent argues that the Eighth Circuit's opinion is not based on the legal premise that a plaintiff in an ADEA case must demonstrate that the employer favored employees outside the protected age group in order to prove a prima facie case of discrimination. The respondent, quite simply, is wrong, as the pertinent passages of the Eighth Circuit's opinion, quoted in full, demonstrate:

> *But here, plaintiffs' theory—that others were permitted to "bump" in the past in a similar situation—contains the seeds of its own refutation. For the other employees who were allegedly given the privilege that plaintiffs now claim were also within the protected age group and, in fact, were reasonably close in age to the plaintiffs themselves.*
>
> ---
>
> *But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock, the ticket agents whom plaintiffs wished to "bump," were also in the same general age bracket as plaintiffs. Not a single one of them was outside the protected age group, and Jim Hicks, the person who would have been "bumped" first, was 48 years old, almost the same age as the plaintiff Tarter.*

2. The respondent claims that there is no dispute in the circuits regarding the burden of proof in ADEA suits, stating that "the plaintiffs' burden will vary from case to case, depending on the facts presented," and that the *McDonnell Douglas* guidelines are not "the alpha and omega of possible tests in the age discrimination context." (Brief of Respondent, p. 6) Respondent's argument overlooks decisions in every circuit adopting the *McDonnell Douglas* framework to ADEA cases. Further, it misreads the holdings in several circuits which adopt the fourth element of the *McDonnell Douglas* test as "proof of

favored treatment toward *younger* employees." *See, Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir. 1985); *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979); *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983).

3. Contrary to respondent's argument, the Fourth Circuit, in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983), has quite clearly held that proof of age discrimination requires proof of favored treatment of employees outside the protected age group, a position in conflict with other circuits but consistent with the Eighth Circuit's holding in this case. This position is cast unambiguously in the following passage from *Western Electric:*

> [B]efore requiring Western to produce evidence of legitimate business reasons for the demotion selections, the district court should have required the EEOC either to show that, upon the claimant's demotions, persons outside the protected age class were retained in the same positions, or to produce some other evidence that Western did not treat age neutrally in its demotion selections.

Id. at 1015.

4. During 1985 and 1986, the appellate courts, in reviewing ADEA appeals on the issue of sufficiency of evidence, have reversed a significant number of jury verdicts and have upheld district court judgments N.O.V. and directed verdicts in favor of the defendant. Forty-five percent (45%) of the cases appealed on such grounds fall into these categories, and the phenomenon reflects a pattern on the part of the courts of appeals to erode the right of the ADEA plaintiff to a trial by jury.

5. It is settled that in reviewing a judgment entered on a jury verdict, a court must view the evidence in the light most favorable to the party winning the verdict. The recent number

of appellate reversals of jury verdicts implicates the Seventh Amendment and is a valid basis for review by this Court. In *Galloway v. United States,* 319 U.S. 372 (1943), this Court made clear its displeasure with appellate de novo examinations of evidence presented to a jury. This position has been steadfastly affirmed in subsequent decisions. *See, Colgrove v. Battin,* 413 U.S. 149(1973); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

6. Appended to this brief and labeled Appendices A and B are tables of decisions by the circuit courts involving ADEA jury verdicts. Appendix A contains a list of 29 decisions, all reported ADEA decisions by Courts of Appeals for 1985 and 1986, involving the issue of sufficiency of evidence to support the ADEA claim. Appendix B contains those decisions from Appendix A which are reversals of jury verdicts, affirmances of directed verdicts, or affirmances of judgments notwithstanding the verdict for the defendants.

7. These decisions, including the case at bar, implicate the Seventh Amendment and mandate a review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be granted. The Eighth Circuit's decision is in conflict with the decisions of several circuits and the number of appellate court reversals of jury verdicts implicates the Seventh Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen L. Arndt, hereby state on oath that a copy of the above and foregoing document has been mailed on this 6th day of October, 1986, to opposing counsel.

KAREN L. ARNDT

APPENDIX

APPENDIX A

Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985)

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986)

Bell v. Gas Service Co., 778 F.2d 512 (8th Cir. 1985)

Stacey v. Allied Stores Corp., 768 F.2d 402 (D.C. Cir. 1985)

Taylor v. Home Insurance Co., 777 F.2d 849 (4th Cir. 1985)

Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985)

Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985)

Christensen v. Equitable Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985)

Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985)

Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985)

Maxfield v. Sinclair International, 766 F.2d 788 (3rd Cir. 1985)

Cockrell v. Boise Cascade Corp., 781 F.2d 173 (10th Cir. 1986)

Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799 (11th Cir. 1985)

Williams v. Caterpillar Tractor Co., 770 F.2d 47 (6th Cir. 1985)

Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985)

Wilhelm v. Blue Bell, Inc., 773 F.2d 1429 (4th Cir. 1985)

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985)

EEOC v. University of Oklahoma, 774 F.2d 999 (10th Cir. 1985)

Wilkins v. Eaton Corp., 797 F.2d 342 (6th Cir. 1986)

Bonura v. Chase Manhattan Bank, N.A., 795 F.2d 276 (2d Cir. 1986)

Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408 (11th Cir. 1986)

Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986)

Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986)

Christie v. Foremost Ins. Co., 785 F.2d 584 (7th Cir. 1986)

Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1985)

Merkel v. Scovill, Inc., 787 F.2d 174 (6th Cir. 1986)

Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253 (3rd Cir. 1986)

Johnson v. University of Wisconsin - Milwaukee, 783 F.2d 59 (7th Cir. 1986)

Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986)

APPENDIX B

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986) (reversed jury verdict)

Bell v. Gas Service Co., 778 F.2d 512 (8th Cir. 1985) (reversed jury verdict)

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (reversal jury verdict)

Christensen v. Equitble Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985) (reversed jury verdict)

Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985) (reversed jury verdict)

Merkel v. Scovill, Inc., 787 F.2d 174 (6th Cir. 1986) (reversed jury verdict for two plaintiffs)

Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986) (reversed jury verdict)

Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1985) (reversed jury verdict)

Wilkins v. Eaton Corp., 797 F.2d 342 (6th Cir. 1986) (reversed jury verdict)

Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985) (judgment notwithstanding the verdict affirmed)

Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986) (directed verdict for defendant affirmed)

Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) (directed verdict for defendant affirmed)

Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986) (directed verdict for defendant affirmed)